Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company	)	CC Docket No. 97-121
and Southwestern Bell Communications	)	
Services, Inc. d/b/a Southwestern Bell	)	
Long Distance for Provision of In-Region	)	
InterLATA Services in Oklahoma	)	

NYNEX'S COMMENTS IN RESPONSE TO PUBLIC NOTICE

The following comments are provided by NYNEX[1] in response to a public notice issued in the above-referenced proceeding by the Federal Communications Commission (the "Commission") on April 23, 1997 (the "Public Notice"). In its Public Notice, the Commission requested comments as to, inter alia, the "legal theory of when a BOC is permitted to file under Section 271(c)(1)(B) and when a BOC is foreclosed from proceeding under Section 271(c)(1)(B)" of the Telecommunications Act of 1996 (the "Act").[2]

NYNEX submits that subparagraphs (A) and (B) of Section 271(c)(1) are intended to be complementary, and that reliance upon a Statement of Generally Available Terms ("SGAT") under subparagraph (B) is permitted in any situation where one or more facilities-based providers, as defined in subparagraph (A) ("Facilities-Based Providers"),

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1 The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

2 Public Notice, p. 2.

have not requested interconnection agreements which include all fourteen items of the competitive checklist. This reading of the statute is mandated by the facts that:

- It is supported by the relevant legislative history, which expressly contemplates reliance on a SGAT in combination with interconnection agreements with Facilities-Based Providers which cover less than all of the checklist elements;

- It is the only interpretation consistent with the declared purpose of Congress in adopting the Act, i.e., to "accelerate rapidly" the availability of advanced telecommunications services "by opening all telecommunications markets to competition" at the earliest possible time[3];

- It is the only logical and internally consistent interpretation, and any contrary view leads to demonstrably absurd results; and

- A contrary reading would permit competitors to manipulate the statutory process, in order to delay the opening of their markets to competition, in direct contravention of the abundantly-documented intent of Congress.

It should be noted, first, that the legislative history expressly shows a Congressional intent that subparagraph (B) could be used to complement incomplete interconnection agreements. Thus, one of the members of the House Conference Committee stated, in explaining the Conference Report:[4]

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[3] Joint Explanatory Statement, H.R. Con. Rep. No. 458, reprinted in 1996 U.S.C.C.A.N. 124.

[4] See Cohn v. United States, 872 F.2d 533, 423 (2d Cir.), cert. denied, 493 U.S. 848 (1989) ("[C]onference report sets forth the final agreement of both houses" and "is entitled to great weight in

> The purpose of these provisions is to ensure that a new competitor has the ability to obtain any of the items from the checklist that the competitor wants. It is very possible that every new competitor will not want every item on that list. In such cases, the legislation would not require the Bell operating company to actually provide every item to a new competitor under the agreement contemplated in Section 271(c)(1)(A) in order to obtain in-region relief.
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> Under these circumstances, the Bell operating company would satisfy its obligations by demonstrating, by means of a statement similar to that required by Section 271(c)(1)(B), how and under what terms it would make those items available to that competitor and others when and if they are requested. It would be entirely appropriate under this legislation for the Federal Communications Commission to determine under Section 271(d)(3)(A) that the Bell operating company has fully implemented the competitive checklist[5].

Even if this interpretation were not spelled out in the legislative history, it is the only one consistent with the declared Congressional purpose "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technology and services to all Americans by opening all telecommunications markets to competition."[6] The goal of the Act is to ensure that the removal of barriers to entry in the local exchange market has rendered that market "truly open"[7]. That goal is accomplished whether the fourteen checklist items are covered through a single interconnection agreement, a series of

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determining congressional intent"); United States v. Princeton Gamma-Tech, Inc., 31 F.3d 138, 152 (3d Cir. 1994) (conference report "is the most persuasive evidence of congressional intent").

5 142 Cong. Rec. E262-01 (Feb. 1, 1996) (emphasis added).

6 Joint Explanatory Statement, H.R. Con. Rep. No. 458, reprinted in 1996 U.S.C.C.A.N. 124 (emphasis added).

7 "Preparing for Competition in a Deregulated Telecommunications Market," address by Hon. Joel L. Klein, Acting Assistant Attorney General, Antitrust Division, March 11, 1997, p. 9.

interconnection agreements, an SGAT, or a combination of an SGAT and one or more interconnection agreements.

Further, any contrary reading of the statute necessarily leads to anomalous results in conflict with the objectives of the statute. It is beyond dispute that an SGAT can be relied upon where no Facilities-Based Provider has made a timely request for interconnection and access; yet, under the contrary reading of the statute, that same SGAT would have to be ignored if a Facilities-Based Provider had executed an interconnection agreement covering, e.g., thirteen of the fourteen checklist items. Under that interpretation, the existence of a greater degree of existing competition in the local market would render BOC entry more difficult, a result which would clearly be contrary to the goals of the Act.

There is no assurance that one or more qualifying Facilities-Based Providers will request or accept interconnection agreements that, individually or in combination, include each and every checklist item. Yet, if subparagraphs (A) and (B) are construed to be mutually exclusive, the existence of one or more incomplete agreements could indefinitely prevent a BOC from meeting the checklist under either (A) or (B). Since a BOC that has not entered into any qualifying interconnection agreements is free to meet the checklist by relying on subparagraph (B), no rational objective would be served by penalizing, in this respect, a BOC that has succeeded in reaching one or more qualifying agreements.

The essential issue, with respect to an SGAT under subparagraph (B), is whether the SGAT is sufficient to demonstrate that barriers to competitive entry in the local

exchange market have been removed. If an SGAT is in fact sufficient for that purpose, the objectives of the Act are subverted, not furthered, by an artificial reading which requires the SGAT to be ignored.

Some incumbent long distance carriers have even taken the position that reliance on subparagraph (B) is foreclosed by an interconnection request from any provider unaffiliated with the BOC, even one that does not qualify as Facilities-Based Provider as defined by the Act. That position cannot be reconciled with the statutory language, with the legislative history, or with common sense. By its terms, Section 271(c)(1)(B) is applicable if "no such provider" has made a request for "the access and interconnection described in subparagraph (A)" within the specified period. The term "such provider" clearly refers to the "providers" described in the preceding subparagraph, i.e. providers offering service either "exclusively" or "predominantly" over their own telephone exchange service facilities. The House Conference Committee, in presenting the Conference Report, stated that the BOC either "must have entered into an interconnection agreement contemplated under Section 271(c)(1)(A) with a facilities-based carrier or, if there has been no request for such an agreement, must have provided the statement of interconnection terms contemplated under Section 271(c)(1)(B)...."[8] The Conference Report itself states that a BOC may seek entry under Section 271(c)(1)(B) "provided no qualifying facilities-based competitor has requested access and interconnection" during the specified period.[9]

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[8] 142 Cong. Rec. E262-01 (Feb.1, 1996)(emphasis added).

[9] Joint Explanatory Statement at 148 (emphasis added). See, also, Cong. Rec. H1152 (Feb. 1, 1996)(BOC may petition under Section 271(c)(1)(B) absent request "from a facilities-based competitor that meets the criteria in 271(c)(1)(A)"; H8458 (Aug. 4, 1995)(subparagraph (B)

This conclusion is mandated by logic, as well as by express statements of Congressional intent. Any other result would permit an incumbent long distance carrier to delay BOC competition indefinitely, through the device of delaying its own qualification as a Facilities-Based Provider.

It should also be noted that a contrary reading would permit competitors to manipulate the statutory process for the purpose of delaying the competive opening of their markets, a result which Congress made abundantly clear it did not intend to permit. As was stated by one of the sponsors of the Act, a member of the Senate Commerce Committee:

> Congress fully expects the FCC to recognize and further its intent to open all communications markets to competition at the earliest possible date. The debate over removing legal and regulatory barriers to competition has been resolved with this legislation. Unnecessary delays will do nothing more than invite vested interests to "game" the regulatory process to prevent or delay competition.[10]

And, as was stated by the spokesman for the House Conference Committee in presenting the Conference Report:

> Where the Bell operating company has offered to include all of the checklist items in an interconnection agreement and has stated its willingness to offer them to others, the Bell operating company has done all that can be asked of it and, assuming it has satisfied the other requirements for in-region interLATA relief, the Commission should approve the Bell operating company's application for relief.[11]

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available if no request has been received "from an exclusively or predominantly facilities-based competing provider").

[10] 142 Cong. Rec. S687, S713 (Feb. 1, 1996) (emphasis added).

[11] 142 Cong. Rec. E262-01 (Feb. 1, 1996) (emphasis added).

Because Section 271(c)(1)(B) is applicable where a Facilities-Based Provider fails to negotitate in good faith or unreasonably fails to comply with an agreed implementation schedule, some long distance carriers argue that these are the only instances in which subparagraphs (A) and (B) are not mutually exclusive. However, as noted above, the House Conference Committee expressly recognized that "[I]t is very possible that every new competitor will not want every item on [the checklist]", and stated that reliance on a 271(c)(1)(B) statement would be appropriate under those circumstances. Clearly no rational purpose would be served by barring a BOC indefinitely from long distance competition, simply because its competitors chose to acquire one or more checklist items from another source. Indeed, the more extensive a provider's own facilities, the more likely it is to want less than all of the items. To hold that such circumstances render subparagraph (B) unavailable would be directly contrary to the procompetitive objectives of the Act.

The applicability of Section 271(c)(1)(B) thus depends upon whether a BOC has entered into one or more interconnection agreements with Facilities-Based Providers and whether such agreements include all checklist items. A determination of these issues involves questions of fact that must be determined on a case-by-case basis as part of the Section 271 application process. A BOC that has entered into one or more State-approved interconnection agreements, and also has a State-approved SGAT, should be permitted to base its application on alternative grounds, e.g., the SGAT to be relied upon to support the application if it is determined that no agreement is with a qualifying Facilities-Based Provider or that all checklist items are not included in one or more such agreements.

CONCLUSION

For the foregoing reasons, NYNEX respectfully requests that the Commission adopt the foregoing conclusions regarding the legal theory of when a BOC is permitted to file, or is foreclosed from proceeding, under Section 271(c)(1)(B).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deborah Haraldson, hereby certify that a copy of the foregoing "NYNEX's Comments in Response to Public Notice" was sent to the parties set forth below, at the addresses set forth below, this 28th day of April, 1997, by overnight delivery service or, where indicated by asterisk, by hand:

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